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March 15, 2005

Name of Case: Personnel Security Hearing

Date of Filing: June 23, 2004

Case Number: TSO-0119

This Decision concerns the eligibility of XXX XXX XXX ("the individual") to hold an access authorization under the Department of Energy (DOE) regulations set forth at 10 C.F.R. §710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ In view of the nature and extent of the record in this matter, I must conclude that the requested access authorization should be withheld.

Background

Application was made for the individual – an employee of a contractor at a DOE facility – to be granted an access authorization (security clearance). A background investigation was made, and a Personnel Security Interview (PSI) was conducted on April 25, 2002. A second PSI was conducted on May 20, 2002. Based upon the background material, the two PSI's, and a "Questionnaire for National Security Positions" (QNSP) completed by the individual, on January 26, 2004 a Notification Letter was issued by the local DOE security office. The letter advises the individual that under the criteria set forth in 10 C.F.R. §710.8, substantial doubt exists as to the individual's eligibility for a security clearance.

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. §710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

Notification Letter and Record

The Notification Letter states that in contravention of 10 C.F.R. §708(f):

I. Information in the possession of the U.S. Department of Energy (DOE) indicates that (the individual) has deliberately misrepresented, falsified, or omitted significant information from a Questionnaire for National Security Positions or a personnel security interview.

Summarized, the bases for this statement are that the individual:

- Falsely certified that he had never been charged with or convicted of any offense(s) related to alcohol or drugs.
- First responded affirmatively but then changed to “no” his answer to Item 23a of the QNSP, i.e., “Have you ever been charged or convicted of any felony offense?”
- Falsified Part II of the QNSP regarding the nature and extent of illegal drug use. Usage was said to be only social marijuana use when young (“1976-3/91”), but no usage since 1991. During the PSI the individual admitted the statement was falsified as to the extent of usage and substances used because, otherwise, he was afraid he would not get a security clearance.
- Falsely answered no to QNSP 24c: “In the last seven years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving or sale of any narcotic, depressant, stimulant, hallucinogen or cannabis for your own intended profit or that of another?” During the PSI the individual “admitted to purchasing and selling illegal drugs on a regular basis for years and (having been) arrested for trafficking illegal drugs.”

Based upon the two PSI’s, the Notification Letter also states that in contravention of 10 C.F.R. §710.8(k):

II. Information in the possession of the DOE indicates that (the individual) trafficked in, sold, transferred, possessed, used or

experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to Section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.

This statement relies upon the PSI's during which the Individual admitted:

- Using marijuana regularly from 1976 until December 2000.
- Beginning at age eighteen and until December 2001, used cocaine as powder or "crack."
- Using hashish and speed many times, "mushrooms" once.
- Continued drug usage during court-ordered treatment program.
- Purchasing marijuana in pound quantities or more for personal use and sale.
- Purchasing, using and infrequently reselling cocaine.

Finally, the Notification Letter states that the individual:

III. Has engaged in unusual conduct or is subject to circumstances which tend to show that (the individual) is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security. This behavior is subject to the provisions of 10 C.F.R. §710.8(l).

This allegation rests on:

- A felony arrest, conviction, imprisonment and a drug treatment program for "Possession of Marijuana with Intent to Sell," followed by 5 years of probation during which illegal drug use was continued.
- A 1992 arrest for indecent exposure and possession.
- A 1995 urine test that showed positive for cocaine.

Based upon this information, the Notification Letter concludes that substantial doubt exists as to the individual's eligibility for a security clearance and advises that pursuant to 10 C.F.R. §710, a hearing may be requested "on the issue of your eligibility for . . . access authorization." The individual's request for a hearing was received on June 23, 2004.²

It is important to note that these "charges" of the Notification Letter are essentially uncontested by the individual and are supported by the record.³

Hearing

Only counsel appeared for DOE at the hearing. A friend and colleague acted as the individual's representative, and seven co-workers and the individual's fiancée appeared as witnesses on behalf of the individual. The friend, colleague and representative also testified on the individual's behalf.

The Individual

After the individual was sworn, DOE Counsel questioned the individual as to his personal as well as employment history and, in the order set forth in the Notification Letter, each of DOE's concerns.

In Section I. A., the Notification Letter states that the individual:

Falsely certified that he had never been charged with or convicted of any offense(s) related to alcohol or drugs.

After an exchange of questions and responses, DOE counsel summarized the individual's response: "your defense in this is you misread the question or didn't understand what it meant?" To which the individual responded "Yes, sir." *Transcript of January 25, 2005 Hearing (Tr.) at 25.*

² The full record underlying the Notification Letter -- such as the transcripts of the PSIs and copies of the QNSPs -- was not provided to this office or the individual until November 18, 2004.

³ The Notification Letter also states that the individual "purchased drugs on occasion instead of paying bills to meet his family's financial responsibilities."

In summary, Section I.B. of the letter states that the individual

First responded affirmatively but then changed to “no” the answer to Item 23a of the QNSP, i.e., “Have you ever been charged or convicted of any felony offense?”

In the hearing the individual first testified that he did not remember changing his answer to 23a, and then speculated that the response was changed because someone in a position to look over the form stated “You can’t do that, you won’t get a clearance if you mark that [answer to 23a yes].” *Tr. at 29.* The individual also speculated that the answer might have been changed due to a misunderstanding and because the probationary period that attended the felony had been completed. *Tr. at 36.*

Section I.C. of the letter states that the individual

Falsified Part II of the QNSP regarding the nature and extent of illegal drug use. Usage was said to be only social marijuana use when young (“1976-3/91”), but no usage since 1991. During the PSI the individual admitted the statement was falsified as to the extent of usage and substances used because, otherwise, he was afraid he would not get a security clearance.

The individual had admitted the accuracy of this charge in writing and did so again in the hearing, in each case emphasizing that he was “clean and sober now.” *Tr. at 40.*

At Section I. D. the letter states that the individual

Falsely answered no to QNSP 24c: “In the last seven years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving or sale of any narcotic, depressant, stimulant, hallucinogen or cannabis for your own intended profit or that of another?” During a PSI the individual “admitted to purchasing and selling illegal drugs on a regular basis for years and (having been) arrested for trafficking illegal drugs.”

DOE Counsel observed that the individual had responded “no” to 24c and asked whether that was “a correct answer.” The individual responded “No, absolutely not . . . I should have put ‘yes.’ ” *Tr. at 41-2.*

Concerning the Section II of the Notification Letter summarized above, DOE Counsel pointed out that in a written response to the letter the individual had answered that the statements in the section were “true, but [the individual is] now clean and sober.” *Tr. at 44.* The individual did not supplement nor change that answer.

As to Section III of the Notification Letter relating to Criterion L, DOE Counsel asked the individual: “Do you agree that those . . . items (enumerated in Section III) are factually correct?” To which the individual answered, “Yes, sir.” *Tr. at 44.*

There was also a good deal of testimony concerning emotional distractions and disruptions earlier in the individual’s life, the dissolution of a marriage, and his resolve to become clean and sober that accompanied the responsibilities of single parenthood. In this regard, DOE Counsel elicited testimony that the individual had ceased using illegal drugs – marijuana – some time before the first PSI, or approximately the end of calendar year 2001, “less than two-and-a-half years” before the hearing. *Tr. at 46 – 57.*

The Individual’s Witnesses

For the benefit of the individual -- who was not represented by counsel -- and to enhance the hearing, DOE Counsel introduced and qualified all of the individual’s witnesses. To the extent appropriate, DOE Counsel also elicited clarifying testimony on behalf of the individual.

The individual’s representative attested to knowing the individual both on and off the job for an extended period, stating that the individual was a good, reliable colleague. He also stated that the individual had struggled with drugs and had been successful. In addition, he stated that the individual had difficulty with filling

out/completing forms, and tended to get “spun up pretty quick” under pressure. *Tr. at 58-9.* I understood the testimony introduced about paperwork difficulty and pressure as being intended to explain the individual’s incorrect answers to questions on the QNSP.

The second witness testified to knowing the individual for an extended time as a neighbor and on the job. The witness also testified to the individual’s honesty but was unaware of the events and concerns that precipitated the hearing. In response to questioning, he was not able to affirm that the individual had difficulty with paperwork. *Tr. at 64-72.*

The next witness called by the individual testified to knowing the individual on the job for three years, that he saw him daily, and that he believed him to be honest, trustworthy and reliable. He also stated that the individual did not come to work impaired and that he thought the individual could be believed when stating that he would not use drugs again. The witness was not able to testify that the individual was unusually excitable or found paperwork to be inordinately frustrating or difficult. *Tr. at 75-82.*

The fourth witness, also a colleague at work, unequivocally endorsed the individual’s good character and his outstanding work habits and abilities. This witness also thought the individual to be honest but did not know that reasons for the hearing – but said it was “a shock to hear the he had issues with that before.” He had never seen the individual at work “impaired” and would keep him on the job regardless of the outcome of the hearing. He did not testify that the individual had any unusual issues of excitability or problems with paperwork. *Tr. at 84-91.*

The following witness was also a co-worker who saw the individual daily. He, too, stated that the individual was honest and reliable, but did not know the bases of the hearing. Nor had he ever seen the witness be impaired at work. However, neither was this witness able to testify as to any unusual difficulties the individual had with paperwork. *Tr. at 93-100.*

The individual's fiancée is a long-term employee in the security area. She knew of the bases for the hearing, but attributed the incorrect QNSP answers to "the time that he was moving out or getting divorced from his wife, and he didn't have all the information." *Tr. at 104.*

She was not able to testify as to any unusual problems the individual might have with reading – but did testify as to having to assist the individual with some forms and paperwork. She stated absolutely and convincingly that the individual had not used drugs since they started dating. *Tr. at 101-108.* This tends to corroborate the individual's statements as to when he ceased using drugs.

The seventh witness for the individual also testified as to the individual's excellent work performance, honesty and reliability on and off the job. This witness did not know of the specific reasons for the hearing, but had been told by the individual of his drug use in the past. *Tr. at 111-116.*

The next witness had known the individual as a co-worker and security escort for three months. He stated that the individual was a good instructor, never late and always reliable. This witness was not familiar with the reasons for the hearing. *Tr. at 118-122.*

The ninth witness knew that the individual had made a mistake on the QNSP and was sorry for it. He testified that the individual was honest, reliable and trustworthy, and not "the kind of person that would accept a bribe from a person to overthrow the United States." *Tr. at 129-130.* The witness also stated he had never seen the individual impaired and would not tolerate that kind of behavior. *Tr. at 126-132.*

At this point the representative again testified to the individual's honesty and reliability, and that the individual was never impaired on the job. The representative also testified to the individual's character and described in some detail the difficulty the individual encountered with paperwork. *Tr. at 135-146.*

Standard of Review

Applicable DOE regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct, set out in Section 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; how recently and often the conduct occurred; the age and maturity of the individual at the time of the conduct; whether participation was voluntary; rehabilitation, reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

A DOE administrative review proceeding under 10 C.F.R. Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b) (6). Once DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. The DOE regulations were amended in 2001 to state that any doubt regarding an individual's eligibility for access authorization shall be resolved in favor of the national security. 10 C.F.R. § 710.7(a). For the reasons discussed below, it is my opinion that the individual has not resolved the concerns in the Notification Letter, and should not be granted access authorization at this time.

Analysis & Decision

From the hearing testimony of the individual and witnesses, I have no doubt that he is an excellent addition to the workplace and that his commitment to be free of drugs is sincere. However, work habits and recent character changes do not outweigh his long history of involvement with banned substances. Balanced against that history, I do not believe that the individual has refrained from using drugs for a sufficiently long period of time to be thought of as reformed or rehabilitated, or that he has undergone a permanent behavioral change.

Moreover, falsifying a QNSP or making false statements to a federal official in any area, but particularly where national security is involved, is a very serious matter that is itself actionable.⁴ It is possible that inattention and carelessness led to some of the misstatements by the individual on the QNSP. I do not, however, find that possibility particularly mitigating. The QNSP involves matters of national security. If one treats the QNSP with carelessness and inattention, why would not that level of care also be brought to other matters of national security in the future?

Furthermore, according to the individual's own testimony, carelessness and inattention do not explain all of the misstatements. In at least one case -- according to the individual -- he made a false answer upon the advice of another person who stated to the individual:

“If you leave (QNSP no. 23a⁵ marked “yes”), you’re not going to get a clearance.”

Tr. at 321.

Excepting the honesty and candor in which this statement was made, I cannot find the admission mitigating in any way. To the

⁴ “I understand that a knowing and willful false statement on this form can be punished by a fine or imprisonment or both.” *Questionnaire for National Security Positions*.

⁵ “have you ever been charged with or convicted of any felony offense?” *Questionnaire for National Security Positions, at 7*.

contrary, this admission supports the Notification Letter which states the individual has:

engaged in unusual conduct or is subject to circumstances which tend to show that (the individual) is not honest, reliable, or trustworthy; ***or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress.***

Notification Letter, Attachment at Section III. (emphasis supplied).

Under the circumstances, I see no choice but to uphold the conclusions of the January 26, 2004 Notification Letter.

Conclusion

For the reasons set forth above, I conclude that the individual has not resolved the security concerns set forth in section 710.8, paragraphs (F), (K) and (L) of the regulations. Consequently, I conclude that the individual has not demonstrated that granting a clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual's access authorization should not be granted at this time.

Richard T. Tedrow
Hearing Officer
Office of Hearings and Appeals

Date: March 15, 2005

